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FOR
ALTERNATIVE DISPUTE RESOLUTION MEDIATION**

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**LOCAL RULES
FOR
ALTERNATIVE DISPUTE RESOLUTION MEDIATION**

1. PURPOSE AND SCOPE OF RULES

1-1. Title.

These are the Local Rules for Alternative Dispute Resolution Mediation in the United States District Court for the Northern District of Illinois, Western Division. They should be referred to as "ADR L.R. ____."

1-2. Purpose and Scope.

(a) Purpose. The Court recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay resolution of disputes for considerable periods. The Court also recognizes that sometimes an alternative dispute resolution procedure can improve the quality of justice by improving the parties' clarity of understanding of their case, their access to evidence, and their satisfaction with the process and result. The Court adopts these ADR Local Rules to make available to litigants a court-sponsored ADR mediation process to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation without impairing the quality of justice or the right to trial.

Commentary

The Alternative Dispute Resolution Act of 1998, 28 U.S.C. Sections 651-658, requires each federal district court to authorize by local rule the use of at least one ADR process in all civil actions. In accordance with § 651(c), the Court has examined the effectiveness of its ADR programs and has adopted improvements consistent with the Act.

(b) Scope. These ADR Local Rules are effective January 3, 2003 and shall govern actions pending or commenced on or after that date. These rules supplement the Civil Local Rules of the Court and, except as otherwise indicated, apply to appropriate original civil actions as determined by the Court with the aid of the parties, but not including actions involving *pro se* litigants, mortgage foreclosures, social security, prisoner civil rights, and bankruptcy appeals.

2. GENERAL PROVISIONS

2-1. ADR Unit.

(a) Staff and Responsibilities. Reserved.

2-2. ADR Magistrate Judge.

The Judges of the Western Division will designate a United States Magistrate Judge as the ADR Magistrate Judge. The ADR Magistrate Judge is responsible for overseeing the ADR Unit, consulting with the ADR Director and ADR Program Counsel on matters of policy, program design and evaluation, education, training and administration. The ADR Magistrate Judge shall rule on all requests to be excused from appearing in person at mediation sessions, and shall hear and determine all complaints alleging violations of these ADR Local Rules. When necessary, the District Judge for the Western Division, to whom the case is assigned, will perform, temporarily, the duties of the ADR Magistrate Judge. When the term “court” or “judge” appears in the balance of these rules, the term includes the ADR Magistrate Judge.

2-3. Referral to ADR Mediation Program.

(a) Referral. Cases may be referred to the Court’s mediation program by agreement of the parties or by the Court at the time of entry of the Case Management Order as ordered by the Court pursuant to Civil Local Rule 26.1. The Case Management Order entered by the Court will note when a case has been referred to mediation. The Case Management Order shall also specify the time frame in which the ADR process will be completed. The court may stay discovery for a reasonable period of time to facilitate the mediation process. A case not referred to mediation at the time of entry of the Case Management Order may be referred to mediation at any time prior to trial by agreement of the parties or by order of the Court.

The Court, in considering whether a case is appropriate for referral to mediation, shall consider the likelihood that mediation will be beneficial, the burden imposed on the parties by mediation, the additional cost to the parties, and the recommendations of the parties. If the Judge at the case management conference determines that mediation is not likely to deliver benefits to the parties sufficient to justify the resources consumed by its use, the Judge will exempt the case from participating in any ADR process.

Commentary

The committee on the Pilot Mediation Program for the U.S. District Court for the

ADR Local Rules

Northern District of Illinois, Western Division, relied heavily on the Local Rules governing Alternative Dispute Resolution from the U.S. District Court for the Northern District of California. Those Rules allow for automatic referral of cases to non-binding arbitration and early neutral evaluation as well as mediation. The committee recommended to the court that non-binding arbitration and early neutral evaluation not be court annexed alternatives in the Western Division.

Regarding early neutral evaluation, the recommendation of the committee was based on the impression that early neutral evaluation appeared, under the Northern District of California Local Rules, to offer no more than mediation and to lack the resolution oriented approach of mediation. It is assumed, however, that mediators, although neutrals, will not only act to facilitate compromise but will be willing and able to offer litigants frank and confidential third-party assessments of their relative positions and risks.

Moreover, non-binding arbitration was viewed by the committee as inflexible and ineffective. The members of the committee were practitioners familiar with the Illinois state courts' system of mandatory non-binding arbitration. Most committee members, both of the plaintiffs' and defendants' bars, reflected that non-binding arbitration adds a layer of expense in preparing for the arbitration because many arbitration awards (approximately 44%) are rejected.

These Rules are intended to reflect the consensus of the committee and the Court that mediation become part of the case management process and that, like the case management process, there be flexibility in the use of Court annexed alternative dispute resolution. It is the intent of these Rules that the Court, working with the parties, may refer cases to mediation at any time prior to trial, but most frequently, at the time of entry of the case management order. Additionally, the Court should have the authority to stay (for reasonable periods) discovery or other litigation transactions in order to reduce the costs to parties and to facilitate mediation. Alternatively, the Court should be able, in appropriate cases, to stay the mediation process. Nothing in these Rules is intended to limit the Court's ability to conduct settlement conferences pursuant to Fed. R. Civ. P. 16. Further, the committee further recommends that the Local Rules governing ADR in the Western Division be interpreted by the Court with flexibility in allowing the parties the alternative of electing private avenues of alternative dispute resolution such as private arbitration or mediation.

(b) Complementary Alternative Dispute Resolution. Nothing in these Local Rules shall be interpreted as limiting the Court or the parties from engaging in ADR outside of the Court's mediation program. The Court shall have the authority to engage the parties in accordance with Fed. R. Civ. P. 16 and, additionally, the Court may, at its discretion, allow the parties a reasonable opportunity to participate in private ADR. Private ADR proceedings are not subject to the enforcement, immunity or other provisions of the ADR Local Rules.

(c) Relief From Court Ordered Mediation. Any party whose case has been ordered to mediation may file with the ADR Magistrate Judge, within 10 days of Court ordered referral, a motion for relief from the Court ordered referral. The party seeking relief shall demonstrate that mediation would not be likely to deliver benefits to the parties sufficient to justify the resources consumed by its use and/or would impose an undue hardship upon the moving party and/or would unnecessarily increase litigation costs. The

parties may file a joint motion under this Rule.

2-4. Mediators.

(a) Panel. The ADR Unit shall maintain a panel of mediators serving in the Court's ADR mediation programs. Mediators will be selected from time to time by the Court from applications submitted by lawyers willing to serve or by other persons as set forth below. The ADR Director and ADR Program Counsel may serve as mediators. The panel of mediators shall be available on the website for the Court at <http://www.ilnd.uscourts.gov>.

(b) Qualifications and Training. Each lawyer serving as a mediator in a Court ADR program shall be a member of the bar of this Court or a member of the faculty of an accredited law school and shall successfully complete initial and periodic training as required by the Court. Additional minimum requirements for serving on the Court's panel are that mediators shall have been admitted to the practice of law for at least 7 years and shall be knowledgeable about civil litigation in federal court. Mediators shall have strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations. Mediators shall have sufficient experience and familiarity with the field of law in which they are serving so as to provide the parties with credible evaluation and assessment of their relative positions. Mediators who are not lawyers may also be selected to serve on the Court's panel of mediators if they have appropriate professional credentials in another discipline and are knowledgeable about civil litigation in federal court. The Court may modify, in individual circumstances for good cause, all of the requirements of this paragraph.

(c) Oath. Persons serving as mediators in any of the Court's ADR programs shall take the oath or affirmation prescribed in 28 U.S.C. § 453.

(d) Disqualification of Mediators. No person may serve as a mediator in a case in a Court ADR program in violation of the standards set forth in 28 U.S.C. § 455.

(e) Immunities. All persons serving as mediators in any of the Court's ADR programs are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

2-5. Evaluation of ADR Programs.

Congress has mandated that the Court's ADR programs be evaluated. Mediators, counsel and clients shall promptly respond to any inquiries or questionnaires from persons authorized by the Court to evaluate the programs. Responses to such inquiries will be used for research and monitoring purposes only.

3. CERTIFYING THE ADR MEDIATION PROCESS

3-1. Meet and Confer to Select ADR Mediation Process.

After the filing of a civil case or its removal to the District Court, counsel shall confer to attempt to agree on an ADR mediation process, including the selection of a mediator from the Court's panel of mediators as found on the Court's website at <http://www.ilnd.uscourts.gov>. At the initial case management conference before the Court, counsel shall be expected to report to the Court on whether agreement on Court referred mediation has been reached and whether a mediator has been selected.

3-2. ADR Certification.

Unless otherwise ordered, no later than the date specified in the Case Management Order, the parties through their attorneys shall file with the Court a certification that:

- (a) Each has read the Local Rules and pamphlet governing the Court's mediation program;
- (b) The attorneys have discussed with their respective clients the available dispute resolution options provided by the Court and private entities;
- (c) An estimate of the fees and costs that would be associated with litigation of the matter, through trial, has been given to the client; and

(d) The mediator has been selected by the parties and the date of mediation or the other method of ADR selected is identified. This certification may be contained in the body of the CMO.

3-3. Conference.

If counsel are unable to agree on the selection of a mediator from the Court's panel of available mediators, the Court shall assist the parties in the selection of a mediator.

4. MEDIATION

4-1. Description.

Mediation is a flexible, non-binding, confidential process in which a neutral person (the mediator) facilitates settlement negotiations. The mediator improves communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy. Consistent with the principles of impartiality and party self-determination, a mediator may be expected, in appropriate cases, to offer the parties frank and confidential evaluations of the relative strengths, weaknesses, and risks of their respective cases.

4-2. Eligible Cases.

Subject to the availability of administrative resources and of a suitable mediator, appropriate civil cases may be referred to mediation by order of the Judge following a stipulation by all parties, on motion by a party, or on the Judge's initiative.

4-3. Mediators.

(a) **Appointment.** A list of mediators on the ADR panel shall be maintained on the Court's website (<http://www.ilnd.uscourts.gov>) and, after agreement of the parties that the case should be referred to mediation or entry of an order referring a case to mediation, the parties should select a mediator or seek the assistance of the Court in choosing a mediator for appointment as the mediator for the case.

(b) Compensation. Mediators shall be compensated at their usual customary rates or such other rate that all parties agree to pay. Compensation of the mediator shall be agreed upon by the parties and the mediator prior to mediation. If the parties fail to reach agreement prior to mediation, the parties will share the cost of the mediator on a *pro rata* basis. Mediators may charge for reasonable time used to prepare for mediation. No party may offer or give the mediator any gift.

(c) Payment. All terms and conditions of payment must be clearly communicated to the parties. The parties may agree to pay the fee in other than equal portions. The parties shall pay the mediator directly.

4-4. Timing and Scheduling the Mediation.

(a) Scheduling by Mediator. Promptly after being selected for a case, the mediator shall arrange for the pre-mediation conference under ADR L.R. 4-6 and, after consulting with all parties, shall fix the date and place of the mediation within the deadlines set by paragraph (b) below, or the order referring the case to mediation. Counsel shall respond promptly to and cooperate fully with the mediator with respect to scheduling the pre-session phone conference and the mediation session.

(b) Deadline for Conducting Mediation. Unless otherwise ordered, the mediation shall be held within 60 days after entry of the Case Management Order or the Order of Referral whichever is appropriate.

4-5. Request To Extend the Deadline.

(a) Motion Required. Requests for extension of the deadline for conducting a mediation shall be made to the ADR Magistrate Judge, with a copy to the other parties, the mediator (if selected), and the ADR Unit.

(b) Content of Motion. Such motion shall:

- (1)** Detail the considerations that support the request;
- (2)** Indicate whether the other parties concur in or object to the request; and
- (3)** Be accompanied by a proposed order setting forth a new deadline by which the mediation shall be held.

4-6. Contact With The Mediator Before The Session

The mediator may schedule a brief joint conference with counsel before the mediation session to discuss matters such as the scheduling of the mediation, the procedures to be followed, the nature of the case, which client representatives will attend, and if the 4-7 written statements should be exchanged by counsel.

4-7. Written Mediation Statements.

(a) **Time for Submission.** No later than 10 calendar days before the first mediation session, or in the time established by the mediator, each party shall submit directly to the mediator, a written Mediation Statement. The statement may be transmitted solely to the mediator. Whether the statement will be sent solely to the mediator, or exchanged by the parties, will be determined at the ADR L.R. 4-6 conference.

(b) **Prohibition Against Filing.** The statements shall not be filed.

(c) **Content of Statement.** The statements shall be concise, no more than five pages in length, and may include any information that may be useful to the mediator and, unless directed otherwise by the mediator, shall:

(1) Identify, by name and title or status:

(A) The person(s) with decision-making authority, who, in addition to counsel, will attend the mediation as representative(s) of the party, and

(B) Persons connected with a party opponent (including an insurer representative) whose presence might substantially improve the utility of the mediation or the prospects for settlement;

(2) Describe briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

(3) Identify the discovery or motions that promise to contribute

most to equipping the parties for meaningful settlement negotiations;

(4) Describe the history and current status of any settlement negotiations and provide any other information about any interests or considerations not described elsewhere in the statement that might be pertinent to settlement; and

(5) Include copies of documents likely to make the mediation more productive or to materially advance settlement prospects.

4-8. Attendance at Session.

(a) **Parties.** All named parties and their counsel are required to attend the mediation unless excused under paragraph (d) below. With the prior permission of the Court, a party, or multiple parties represented by the same counsel, may appear through a representative so long as the party's representative is authorized to negotiate settlement on behalf of the party. This requirement reflects the Court's view that the principal values of mediation include affording litigants opportunities to articulate directly to the other parties and a neutral their positions and interests and to hear, first hand, their opponent's version of the matters in dispute. Mediation also enables parties to search directly with their opponents for mutually agreeable solutions.

(1) **Corporation or Other Entity.** A party other than a natural person (e.g., a corporation or an association) satisfies this attendance requirement if represented by a person (other than outside counsel) who has authority to negotiate settlement and who is knowledgeable about the facts of the case.

(2) **Government Entity.** A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, authority to negotiate settlement, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also shall attend.

(b) **Counsel.** Each party shall be accompanied at the mediation by the lawyer who will be primarily responsible for handling the trial of the matter.

(c) Insurers. Insurer representatives are required to attend in person unless excused under paragraph (d) below, if their agreement would be necessary to achieve a settlement.

(d) Request to be Excused. A person who is required to attend a mediation may be excused from attending in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must submit, no fewer than 15 days before the date set for the mediation, a motion to the ADR Magistrate Judge, simultaneously copying the ADR Unit, all counsel and the mediator. The motion shall:

- (1) Set forth all considerations that support the request;
- (2) State realistically the amount in controversy in the case;
- (3) Indicate whether the other party or parties join in or object to the request, and
- (4) Be accompanied by a proposed order.

(e) Participation by Telephone. A person excused from appearing in person at a mediation shall be available to participate by telephone.

4-9. Procedure at Mediation.

(a) Procedure. The mediation shall be informal. Mediators shall have discretion to structure the mediation so as to maximize the benefits of the process.

(b) Separate Caucuses. The mediator may hold separate, private caucuses with each side or each lawyer or, if the parties agree, with the clients only. The mediator may not disclose communications made during such a caucus to another party or counsel without the consent of the party who made the communication.

4-10. Confidentiality.

All materials exchanged and statements made as part of the mediation process conducted pursuant to these rules are confidential.

Commentary

See, Fed. R. Evid. 408; 28 U.S.C. § 652(d). Full and candid discussion is essential to successful

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resolutions in mediation. Such discussion is best supported by an assurance that mediation communications will be held in strictest confidence. The law may provide some limited circumstances in which the need for disclosure outweighs the importance of protecting the confidentiality of a mediation. *E.g.*, threats of death or substantial bodily injury (*see* Or. Rev. Stat. Section 36.220(6)); use of mediation to commit a felony (*see* Colo. Rev. Stat. Section 13-22-307); right to effective cross examination in a quasi-criminal proceeding (*see Rinaker v. Superior Court*, 62 Cal. App. 4th 155 (3d Dist. 1998)); lawyer duty to report misconduct (*see In re Waller*, 573 A.2d 780 (D.C. App. 1990)); need to prevent manifest injustice (*see* Ohio Rev. Code Section 2317.023(c)(4)).

4-11. Follow Up.

In the event a mediation conference does not result in an agreed upon resolution of the case at the close of the mediation session, the mediator and the parties shall jointly determine whether it would be appropriate to schedule a follow up session. Such follow up could include, but need not be limited to, written or telephonic reports that the parties might make to one another or to the mediator, exchange of specified kinds of information, or another mediation session. The mediator may, to the extent agreed upon by the mediator, the parties, and the Court, stay involved in the case following mediation and up to the time of trial in order to continue to facilitate resolution.

4-12. Certification of Session.

Within 10 days of the close of each mediation session and on the form Certification of Session provided by the Court, the mediator shall report to the ADR Unit: the date the session was held, whether the case settled in whole or in part, whether any follow-up is scheduled, any stipulations the parties agree may be disclosed, and any other data necessary for the effective management of the program which would not violate expectations of confidentiality. The ADR Unit will file the certification.

Within the same 10 day period, if a settlement was reached, the mediator shall help the parties draft a settlement agreement and a stipulation to dismiss which, when executed, is filed with the Court.

4-13. Violation of the ADR Local Rules.

(a) Reporting Violation.

(1) Complaints Alleging Material Violations. A complaint alleging that any person or party, including the mediator, has materially violated any of the ADR Local Rules shall be presented in writing directly to the ADR Magistrate Judge. Such a letter of complaint must be accompanied by a competent declaration. Copies of the letter of complaint and declaration must be sent contemporaneously to all other parties, the mediator (if identified) and the ADR Unit. The letter of complaint and declaration shall not be filed.

(2) Report by Mediator. A mediator who perceives a material violation of these ADR Local Rules shall make a written report

directly to the ADR Magistrate Judge and contemporaneously provide copies to all counsel and to the ADR Unit. Such report shall not be filed.

(b) Proceeding in Response to Complaint or Report of Violation and Sanctions. If, upon receiving an appropriately presented and supported complaint or report of a material violation of these ADR Local Rules, the ADR Magistrate Judge determines that the matter warrants further proceedings, the ADR Magistrate Judge shall order a party to file a formal appropriate motion with the court, which will then be heard by the ADR Magistrate Judge. All parties shall be allowed to participate at the hearing and present appropriate evidence.